

MEMORANDUM

To: Water Adjudication Advisory Committee; Honorable C. Bruce Loble, Chief Water Judge

From: Michael J.L. Cusick, John Bloomquist, Holly Franz

Date: December 8, 2011

Re: Revised “Certification Option” for Determination of Exempt Water Rights; “Voluntary Petition Option”
Our File No.: 66060\001

As noted in the minutes from the November 17, 2011 Advisory Committee meeting, the purpose of this Memorandum is to revise the “Certification Option” for the determination of exempt water rights to include notice provisions. The intent of the notice provisions is to provide a mechanism for making exempt right determinations binding on other parties in a particular basin.

In revising this “Certification Option” and taking into account the comments made at the last meeting regarding notice problems and finality of decrees, we have re-thought our approach to this option and have substantially revised it. The result is a voluntary petition process that does not involve the “certification process” of § 85-2-406(2)(b) at all. Rather, it is a “Voluntary Petition” process created by amendments to § 85-2-222 that incorporate the notice provisions of post-decree motions to amend under § 85-2-233(6). The proposal begins with amendments to § 85-2-222 as follows:

85-2-222. Exemptions. “(1) Claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or groundwater sources and claims for rights in the Powder River Basin included in a declaration filed pursuant to the order of the department or a district court issued under Sections 8 and 9 of Chapter 452, Laws of 1973, or under Sections 3 and 4 of Chapter 485, Laws of 1975, are exempt from the filing requirements of 85-2-221(1). Such claims may, however, be voluntarily filed pursuant to 85-2-221(1), or may be determined pursuant to subsection (2) below until (a) issuance of a final decree pursuant to 85-2-234 or (b) re-opening of a final decree pursuant to 85-2-237, whichever occurs later.

(2) The owner of an existing water right exempt from filing under subsection (1) above may file a petition in the Water Court requesting a determination of the exempt water right provided that the owner of the right publish notice of a motion to amend the temporary preliminary or preliminary decree to include the exempt right determined pursuant to the provisions of 85-2-233(6). The costs of the notice must be borne by the petitioner requesting determination of the exempt right. The Water Court may set a reasonable filing fee for such petitions.

(3) Any claims for existing rights that are exempt from filing under subsection (1) and that are not voluntarily filed under 85-2-221(1) or determined as provided for in subsection (2) above are not forfeited but are deemed *de minimus* uses of water. Such *de minimus* uses of water are not subject to administration under 85-2-406(1).

This proposal would require some clarifying amendments to the existing amendment and notice provisions. Amend 85-2-233(6) as follows:

“(6) After the issuance of a temporary preliminary decree or preliminary decree, notice of any motion to amend such decree to include claims exempt from filing under 85-2-222, a statement of claim or a timely filed objection that may adversely affect other water rights must be published once a week for three consecutive weeks in two newspapers of general circulation in the basin for which the particular decree was issued, or where the statement of claim or objection was filed. The notice must specify that any response or objection to the proposed amendment must be filed within 45 days of the date of the last notice. The water judge may order any additional notice of the motion as the water judge considers necessary. The costs of the notice required pursuant to this section must be borne by the moving party.

The goal of these amendments is to create a voluntary process that has finality. The process differs from the previous “Certification Option” because it does not require a water distribution controversy as a prerequisite to an exempt right determination. However, if a

distribution controversy involving exempt rights arises before the final decree, existing Section 85-2-406(2)(b) will provide for determination of the exempt rights “according to part 2 of this chapter” under new subsection § 85-2-222(2).

The intent is to provide for exempt right determinations up through the issuance of the final decree or the final objection period in the event a final decree is re-noticed throughout the water division. In addition to the statutory amendments, the Water Court should revise its future “Notices of Availability” issued under 85-2-232 to provide claimants and objectors with additional notice of the existence of this “Voluntary Petition” process for exempt rights.

A voluntary petition would not be a “claim of existing right filed in accordance with 85-2-221” and, therefore, would not be *prima facie* proof of its content under § 85-2-227, MCA. The petition would be subject to general rules of pleading in civil cases and the petitioner would have the burden of making a *prima facie* case and proving up the exempt right claim. Examination of the elements of an exempt right claimed through the petition process could be implemented by the Water Court as necessary through § 85-2-243, MCA.

After final decrees are issued and re-noticed pursuant to 85-2-237, this “Voluntary Petition Option” will come to an end. Exempt rights not claimed under 85-2-221 or petitioned for under 85-2-222 will be treated as unenforceable *de minimus* uses of water. These uses, which by definition are limited to livestock and individual domestic uses from instream flow or groundwater sources, would be allowed to continue but would have no ability to place a call for water. Such uses will continue to exist in the same unenforceable condition that they have existed in since the April 30, 1982 claim filing deadline.